United States Court of Appeals

for the Second Circuit

SUPPLEMENTAL MEMORANDUM

ORIGINAL

74-1687

SUPPLEMENTAL MEMORANDUM OF AMICUS
CURIAE AMERICAN PETROLEUM INSTITUTE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 74-1687

HOOKER CHEMICALS AND PLASTICS CORPORATION,
STAUFFER CHEMICAL COMPANY, AND MONSANTO COMPANY

Petitioners,

v.

RUSSELL E. TRAIN

Respondent

ON PETITION FOR REVIEW

Of Counsel:

Start Ritchie
Lloyd R. Cress
Clyde R. Hampton
Jess W. Van Ert
William W. Schweinle, Jr.
Carl W. Jones
James A. Evans
Frederick H. Hawkins
Robert A. Meyer
Nicholas I. Cantor
Stephen H. Bard
Donald Gearhart

November 21, 1975

Frederick M. Rowe
Edward W. Warren
Robert F. VanVoorhees
of
KIRKLAND, ELLIS & ROWE
1776 K Street, N.W.
Washington, D. C. 20006

Attorneys for the American
Petroleum Institute and
Eleven Member Companies

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

No. 75-1404

AMERICAN PETROLEUM INSTITUTE, ET AL.,

Appellants,

v.

RUSSELL E. TRAIN, ET AL.,

Appellees.

SUPPLEMENTAL MEMORANDUM FOR APPELLANTS

PRELIMINARY STATEMENT

At oral argument in this case on November 10, 1975, counsel for Appellants ("API") provided the Court with copies of the Third Circuit's November 7, 1975 decision in American Iron & Steel Institute v. EPA, No. 74-1640 ("AISI"). Like the Eighth Circuit in the CPC case,[1/] the Third Circuit in AISI invalidated EPA's so-called "effluent limitations guidelines" for the steel industry on the ground that they unlawfully provided "binding," single-number effluent limitations rather than flexible guidelines, setting forth a "range" of feasible discharge levels and specifying "factors" for consideration by State "permit grantors on a plant-by-plant basis." (Slip Opin. 28, 35-37.)

1/ CPC International, Inc. v. Train, 515 F.2d 1032 (8th Cir. 1975).

On November 14, 1975, EPA filed a supplemental memorandum focusing on the Third Circuit's sub silentio assumption of review jurisdiction over Section 304(b) "guidelines for effluent limitations." However, unlike EPA, the Third Circuit in AISI clearly differentiated between "existing source regulations" under Sections 301 and 304, so that a separate jurisdictional basis must be posited for each. Thus, although nowhere discussed in the Court's opinion, the Third Circuit apparently viewed jurisdiction over Section 304 guidelines as ancillary to review of a Section 301 effluent limitation "ceiling" for the guidelines "range" which the Court presumably considered reviewable under Section 509(b)(1)(E).[2/]

Despite the Third Circuit's square holding that EPA violated the Act by failing to issue flexible Section 304(b) guidelines for use by State "permit grantors," EPA pretends that the Court's discussion of Section 301 somehow validates EPA's unlawful statutory rewrite and issuance of so-called "effluent limitations guidelines" to be cranked mechanically into individual existing plant discharge permits. But actually the Third Circuit's Section 301 discussion, even if it were correct,[3/]

2/ Of course, this is precisely the point made by Appellants' counsel in oral argument.

3/ The Third Circuit's finding of nominal Section 301 authority is unnecessary and redundant in light of that Court's substantive holding that Section 304(b) guidelines must set forth an enforceable "range" of feasible discharge levels, providing both a ceiling and a floor for use by State permit grantors. In view of API's consistent position that EPA has no authority to issue rigid existing plant standards under any provision of the Act, Appellants briefly address the Third Circuit's Section 301 discussion in an Addendum to this Memorandum.

cannot obscure the fundamental conclusion of both the Third and Eighth Circuits -- namely, that EPA unlawfully rewrote the Act when it substituted rigid, existing plant standards for flexible Section 304 guidelines intended by Congress to assist "permit grantors" in setting individual plant effluent limitations under the Section 402 Federal/State permit program.

Hence, as detailed in this Memorandum, under both the CPC and the AISI decisions, EPA's so-called "effluent limitations guidelines" for petroleum refining are invalid since they: (1) fail to constitute flexible, Section 304(b) "guidelines for effluent limitations" providing "guidance" to "permit grantors"; (2) strip the States of their lawful discretion to select individual plant effluent limitations from the guideline "range," based on "factors" specified in the guidelines; and (3) thereby usurp the "primary responsibilities and rights of the States to prevent, reduce and eliminate pollution" under Section 101(b) of the Act.[4/]

Accordingly, this Court should act now to invalidate EPA's rigid existing plant standards for petroleum refineries.

4/ In a similar Clean Air Act context, three Courts of Appeals have recently overturned expedient EPA intrusions into lawful state prerogatives to control pollution within their boundaries. Brown v. EPA, 8 ERC 1053 (9th Cir. 1975); Maryland v. EPA, 8 ERC 1105 (4th Cir. 1975); District of Columbia v. Train, No. 74-1013 (D.C. Cir., Oct. 28, 1975).

For, with the key issues of statutory interpretation fully briefed and argued by both sides, this Court is in a unique position to render an authoritative interpretation of the Act so that the States and EPA can promptly begin to issue outstanding refinery permits through consideration of the individual circumstances of each existing plant as contemplated by Congress.[5/]

A. THE THIRD CIRCUIT RULED THAT THE "PRECISE DEGREE OF EFFLUENT CONTROL REQUIRED OF ANY INDIVIDUAL POINT SOURCE" MUST BE SET BY STATE "PERMIT GRANTORS" UNDER FLEXIBLE FEDERAL "GUIDELINES" RATHER THAN BY EPA IN "NATIONWIDE SINGLE NUMBER EFFLUENT LIMITATIONS."

The Third Circuit invalidated EPA's program for regulating discharges from existing plants through "nationwide single number effluent limitations" because EPA's so-called "effluent limitations guidelines" provide "less flexibility than we believe Congress contemplated." (Slip Opin. 37.)[6/] Instead, the Third Circuit held that "Congress contemplated that some degree of consideration of the enumerated factors

5/ EPA readily concedes that, once it is determined that the Court of Appeals has review jurisdiction, this Court "is authorized to review all questions." Anaconda Co. v. Ruckelshaus, 492 F.2d 1301, 1304 (10th Cir. 1973) (EPA Br. 8). See Petitioners' Motion to Reschedule Briefing Pending Resolution of Statutory Interpretation Issues, filed November 12, 1975, in Nos. 74-1465, et al.

6/ All emphasis added unless otherwise indicated.

[in §304(b)] was to be made by the permit grantors on a plant-by-plant basis." (Id. 28.)

For this reason, the Third Circuit rejected EPA's argument that the Act authorizes the Administrator to "establish limitations which are binding throughout the country and which must be incorporated into any permit issued to any individual point source" subject only to EPA's extremely narrow variance clause. (Id. 5.) Thus, in contrast to EPA's "nationwide single number effluent limitations" to be "mechanically cranked" into individual existing plant permits, the Court held that "the permit grantors are to have a limited and carefully circumscribed discretion to take into account factors as specified by the Administrator." (Id. 29).

As the Court put it, "To hold that [state permit issuance authorities] have no discretion does not make sense in light of the clear command in §304(b)(1)(B) that the 'guidelines' promulgated by the Administrator 'specify factors to be taken into account in determining the control measures and practices applicable to point sources . . . within such categories and classes.'" (Id., emphasis and ellipses in original.)

The Court further rejected EPA's claim that Congress' interest in uniformity dictated creation of rigid single number effluent standards:

> "[W]hile uniformity was clearly a major Congressional concern, some amount of local variation, carefully circumscribed by precise guidelines, was contemplated. In short, uniformity was to be achieved by effluent standards within a given category which were similar, rather than identical or unitary." (Id. 30.)

Finally, in holding that State and regional permit grantors are to "determine the precise degree of effluent control required of any individual point source" (id. 28), the Court rejected as "illogical" and "contrary to the clearly expressed Congressional intent" EPA's contention "that the Administrator is required to promulgate guidelines for broad categories or classes which are to guide himself in setting precise limitations for specific point sources." (Id. 29.)

B. THE THIRD CIRCUIT HELD THAT THE ADMINISTRATOR CANNOT "IGNORE HIS OBLIGATION TO PROMULGATE GUIDELINES SPECIFYING FACTORS TO BE CONSIDERED AND RANGES ABOVE A BASE LEVEL."

"[O]bserving that the Administrator not only has the power, but the explicit obligation to promulgate 'guidelines' under Section 304" (id. 25), the Third Circuit held "that Section 304(b) guidelines were intended to provide permissible 'ranges' of effluent limitations" (id. 31), and that the "guidelines were to "specify factors" to guide the permit grantors

in exercising their "carefully circumscribed discretion in setting precise standards for individual point sources." (Id. 36.)

Based on the Act and its legislative history, including specifically the Senate Report and the remarks of Senator Muskie cited in API's opening brief,[6/] the Third Circuit concluded that the Section 304(b) "guidelines" published by the Administrator must establish permissible "ranges" within which permit grantors are to fix "the precise degree of effluent control required of any individual point source." (Slip Opin. 31-32.)

Moreover, as previously demonstrated, Congress clearly indicated the levels of technology on which the "permissible ranges" for 1977 and 1983 were to be based. (API Br. 28-30.) Thus, the 1977 "range of best practicable levels" is to be "based upon the average of the best existing performance by plants of various sizes, ages, and unit processes within each industrial category," while the 1983 "best available technology" "range should at a minimum be referenced to the best performer in any individual category." (Id.)

The Third Circuit further rejected EPA's argument that the factors specifically enumerated in Section 304(b)(1)(B) and Section 304(b)(2)(B) are only "to be considered by the

6/ S. Rept. No. 92-414, 92d Cong., 1st Sess. 50 (1971), Leg. Hist. 1468; Leg. Hist. 169-70. See API Br. 33.

Administrator in 'assessing' the proper level of technology and 'in promulgating the guidelines.'" (Id. 26, 27.) Instead, the Court concluded that "the Administrator is to conduct the primary consideration of the enumerated factors for classes and categories," and then he is to "specify factors to be taken into account in determining the control measures and practices to be applicable to the point sources . . . within such categories and classes" and to "specify to the permit grantors how some variation in the standards should be made in light of those factors." (Id. 29.)

C. THE THIRD CIRCUIT HELD THAT EPA'S REGULATIONS "FAILED TO CONSTITUTE VALID 'GUIDELINES' . . . SINCE THEY FAILED TO PROVIDE MEANINGFUL RANGES OF GUIDANCE IN CONSIDERING INDIVIDUAL FACTORS."

Having reviewed the statutory requirements for the promulgation of Section 304(b) guidelines, the Third Circuit examined and rejected EPA's arguments, substantially identical to those raised by EPA in this case, that its so-called "effluent limitations guidelines" actually provide the requisite degree of flexibility. Compare EPA Br. 29-31 with Slip Opin. 36-37.

Specifically, the Court dismissed "the Administrator's contention that 'sub-categorization' provides a range," finding, instead, that "[t]he Administrator's subcategorization merely divided the entire iron and steel industry by means of the types of processes employed, and it does not reflect any of the innumerable differences within the particular subcategories." (Id. 36.) Furthermore, the Court found that "[n]o guidance is

given with respect to the remaining Section 304(b) factors, such as age, costs and engineering aspects." (Id.)

Likewise, the Court expressly denied EPA's effort to simulate flexibility through EPA's so-called "variance procedure" (id. 36) on the ground that "the variance procedure provides for less flexibility than we believe Congress contemplated, since it permits deviation only where circumstances of the particular plant are 'fundamentally different' than those from which the effluent limitation was derived." (Id. 37.)

CONCLUSION

In short, far from supporting EPA's interpretation of the Act, the Third Circuit's decision in the AISI case reaches much the same substantive result as the Eighth Circuit in CPC, albeit by a somewhat different route through the statutory language and legislative history.

With two Circuits now having invalidated EPA's so-called "effluent limitations guidelines" on fundamental statutory interpretation grounds, Appellants respectfully request that this Court act as promptly as possible similarly to invalidate EPA's petroleum refining "effluent limitations guidelines" for the reasons set forth in Appellants' Opening

and Reply Briefs in this case.

Respectfully submitted,

HOLLAND & HART

Of Counsel:

Stark Ritchie
Lloyd R. Cress
Clyde R. Hampton
Jess W. Van Ert
William E. Schweinle, Jr.
Carl W. Jones
James A. Evans
Frederick H. Hawkins
William J. Webb
Nicholas I. Cantor
Stephen H. Bard
Donald Gearhart

By Frank H. Morison

Frank H. Morison
500 Equitable Building
730 Seventeenth Street
Denver, Colorado 80202
303-292-9200

Frederick M. Rowe
Edward W. Warren
Robert F. VanVoorhees
of
KIRKLAND, ELLIS & ROWE
1776 K Street, N.W.
Washington, D. C. 20006
202-833-8400

November 20, 1975

Counsel for Appellants

ADDENDUM

As detailed in Appellants' Memorandum, the Third Circuit's overall interpretation of the Act is substantially at odds with EPA's unlawful issuance of counterfeit "effluent limitations guidelines," providing rigid, single-number discharge standards to be cranked mechanically into every existing plant permit. Although the Third Circuit's finding of EPA authority to promulgate a nominal effluent limitation ceiling under Section 301 is fully consistent with the Court's invalidation of EPA's existing plant standards, Appellants remain unconvinced that Congress actually intended to authorize any regulations under Section 301 of the Act. 1/

To begin with, even though the Third Circuit concluded that "the Administrator does have the authority to promulgate effluent limitations under Section 301" (Slip Op. 8), the Court viewed the scope and function of EPA regulations under Section 301 as extremely limited. Thus, the sole function of Section 301 "effluent limitations" would be to "prescribe . . . the maximum amount of effluent discharge (a 'ceiling') that is permissible." (Id. 32-34).

1/ In fact, Judge Adams, joined by Judges Hunter and Garth (see AISI v. EPA, Slip Op. 9, n.14a), admit that "the Court has been obliged to find the power of the Administrator to issue effluent limitations by a series of subtle inferences, rather than by reference to clear statutory language." AISI v. EPA, Concurring Op. 1; accord Slip Op. 8-9.

The key role would be performed by Section 304 "guidelines" whose function would be "to guide the [permit] grantors within a feasible range below the ceiling." (Id. 38.)

In short, the Third Circuit's Section 301(b) "effluent limitations" would do no more than set the upper limit of the "range" of permissible discharge defined in the Section 304(b) "guidelines." Since the guidelines themselves, by definition, provide an enforceable "range," the nominal Section 301 effluent limitation ceiling found by the Third Circuit is superfluous and unnecessary.

Appellants submit that any more than this nominal role of providing a redundant ceiling for the Section 304(b) guideline "range" would be flatly contrary to the Act and its legislative history.

First of all, the Court ostensibly deferred to EPA's construction of the Act. But as set forth in Appellants' briefs in this case,[2/] EPA's original interpretation of the Act actually accords with Congress' flexible guidelines approach. Only later, in the face of statutory deadlines and court timetables for the promulgation of Section 304(b) guidelines,[3/] did EPA switch to its current expedient promulgation of unlawful "effluent limitations guidelines," setting rigid, single-number discharge standards to be mechanically cranked into existing plant permits.

2/ API Br. 21-24; API Reply Br. 18-22. See CPC, Int'l, 515 F.2d at 1039-40.

3/ NRDC v. Train, 6 ERC 1033 (D.D.C., Nov. 27, 1973), aff'd in part, 510 F.2d 692 (D.C. Cir. 1975).

Moreover, the Third Circuit cites only two legislative history references to support EPA authority to publish "effluent limitations" under Section 301(b).[4] Far from overcoming the numerous contrary references in Appellants' briefs,[5] both of the Court's references actually suggest, not the promulgation of separate "ceilings" under Section 301(b) and "guidelines" providing a "range" under Section 304(b), but rather the promulgation of one set of regulations accomplishing both purposes and taking into account the requirements of both "Section 301 and Section 304." Leg. Hist. 1283.

Above all, the Court's tortured reading of "inferences from ancillary provisions" of the Act (Concurring Op. 4) ignores more viable alternative interpretations of the same provisions.

For example, Section 509(b)(1)(E), which the Court calls "[p]erhaps the strongest indication in the Act that the Administrator has the power under Section 301 to promulgate effluent limitations" (Slip Op. 9), is most reasonably construed to refer to "the Administrator's action . . . in approving . . . any effluent limitation or other limitation under section 301 . . . or 306," and "the Administrator's

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4/ AISI v. EPA, Slip Op. 18, quoting Leg. Hist. 1468; Slip Op. 19, quoting Leg. Hist. 1283.

5/ API Reply Br. 5; API Br. passim.

action . . . in . . . promulgating any effluent limitation or other limitation under section 302." (See API R. Br. 8-9.)

Indeed, this reading is strongly suggested by the reference to Section 306 in Section 509(b)(1)(E) which would otherwise be redundant in light of Section 509(b)(1)(A) which makes "any standard of performance under Section 306" separately reviewable in the Court of Appeals. Since the Administrator has the explicit power under Section 306 to issue nationwide single number standards of performance for new plants, the only function left for "effluent limitations . . . under section . . . 306" would be the incorporation of the Section 306 standards in NPDES permits, which must be "approved" by the Administrator. Once again, this suggests that "effluent limitations," including those which the Administrator himself is explicitly authorized to establish on a plant-by-plant basis under Section 302(a), must be issued in the permit-issuing process. 6/

Similarly, the Third Circuit misreads Section 301(c) by suggesting that it presupposes "the existence of a section 301 effluent limitation which the Administrator can relax." (Slip Op. 10, n.15.) As previously demonstrated, the only "requirements" in Section 301(b)(2)(A) which may be modified

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6/ Similarly, §505(f) should be read as referring to "effluent limitation . . . under Section . . . 302" and "other limitation under section 301," with this latter reference being to §301(f) as suggested by the Eighth Circuit in CPC Int'l, 515 F.2d at 1043. Indeed, the Third Circuit recognized that "section 301(f) would seem to be a type of 'other limitation' referred to in section 505(f)(2)." (Slip Op. 14.)

under Section 301(c) are statutory deadlines.[7] Furthermore, the Section 301 effluent limitations referred to in Section 401(a)(1) would be contained in Section 402 NPDES permits.[8]

Finally, the Third Circuit readily admits that other cited sections of the Act specify neither how nor by whom "effluent limitations 'under' or 'pursuant to' section 301" are to be established. AISI v. EPA, Slip Op. 15. Moreover, each of the other sections cited by the Third Circuit has been treated by API, and none of them conflicts with API's construction of the Act. See API Reply Brief 26, n.1- (discussing §301(e) to which §302(c) is closely analogous); 3 (examining §316).

In short, the Third Circuit has "inferred" rule-making authority for EPA that is both unnecessary and contrary to the intent of Congress. Just as this Court recently held in Colorado PIRG v. Train, 507 F.2d 743, 748 (10th Cir. 1974), cert. denied 421 U.S. 998 (1975), another case rejecting an EPA interpretation of the Federal Water Pollution Control Act, "the construction given a statute by the administrative officer charged with carrying out its provisions . . . should not be permitted to overrule the express language of a statute, else the administrative officer will himself be thwarting the will of Congress."

7/ Moreover, these deadlines are the "applicable requirements of section 301" referred to in §402(b)(1)(A) which concerned the Third Circuit. (Id. 8)(API Br. 25). This was precisely Senator Muskie's point since extension of the statutory deadline modifies the permit by changing the schedule of compliance which is, by definition, an effluent limitations. See Section 502(11); Slip Op. 14-15.

8/ See Slip Op. 14-15 for Court's discussion of 401(a)(1) relating to applicants for Federal license or permits other than §402 NPDES permits.

ATTACHMENT 1

November 10, 1975

AAG LSG
90-5-1-7-34

Mr. Thomas F. Strubbe
Clerk
United States Court of Appeals
Seventh Circuit
219 South Dearborn Street
Chicago, Illinois 60604

Dear Mr. Strubbe:

Re: American Meat Institute v. EPA
No. 74-1394

As you know, amici curiae CPC International, Inc. and the American Petroleum Institute have urged that this Court does not have jurisdiction of this action. In support of this position, amici filed briefs and cited CPC International, Inc. v. Train, 515 F.2d 1032 (C.A. 8, 1975). Respondent, the United States Environmental Protection Agency, has argued that this Court has jurisdiction.

On November 7, 1975, the United States Court of Appeals for the Third Circuit in American Iron and Steel Institute, et al. v. Environmental Protection Agency (Nos. 74-1640, 74-1642, 74-1961, 74-2006, and 74-2256) held that courts of appeals have jurisdiction to review regulations under the Federal Water Pollution Control Act such as those contested here. Because we believe that the Court will find

this recent holding to be important. We request that you bring this decision to the Court's attention. As soon as the opinion can be reproduced, we will lodge copies with you.

Sincerely,

Acting Assistant Attorney General
Land and Natural Resources Division

By:

Lloyd S. Guerci
Attorney, Pollution Control Section

Attorney for defendants, the Environmental Protection Agency and its Administrator

cc: Robert Stern, Esquire
Robert C. Barnard, Esquire
Frederick M. Rowe, Esquire
Edward Strohbehn, Esquire

ATTACHMENT 2

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

No. 75-1404

AMERICAN PETROLEUM INSTITUTE, et al.,

Appellants

v.

RUSSELL E. TRAIN, et al.,

Appellees

CLARIFICATION OF POINTS RAISED BY APPELLANTS AT ORAL ARGUMENT

At oral argument on this case held November 10, counsel for the American Petroleum Institute brought to the Court's attention and submitted copies of the case of American Iron and Steel Institute, et al. v. EPA, C.A. 3, No. 74-1640 (Nov. 7, 1975). Counsel for API then proceeded to represent to this Court that, although the Third Circuit in the American Iron and Steel case disposed of the entirety of the iron and steel regulations, it was not clear upon what theory that court had taken jurisdiction over the existing source regulations. When questioned by Judge Breitenstein, counsel for API did hazard the guess, however, that the Third Circuit dealt with the existing source regulations "on some sort of ancillary jurisdiction theory."

Counsel for the EPA has now had a chance to read the American Iron and Steel opinion, and feels compelled to bring to the Court's attention the fact that counsel for API erred in his interpretation of the Third Circuit's holding as to jurisdiction over the existing source regulations.

The Third Circuit, far from taking jurisdiction over the existing source regulations ancillary to its review of new source performance standards and pretreatment standards, specifically held that "the Administrator does have the authority to promulgate effluent limitations under section 301" (slip op. 8; emphasis added). The court then went on (slip op. 9-24) to refute, point by point, the analysis of Sections 301 and 304 contained in CPC International, Inc. v. Train, 7 E.R.C. 1887 (C.A. 8, 1975), which is the case upon which API relies.

In addition, Judge Breitenstein at oral argument expressed his concern that the Federal Water Pollution Control Act is not a paragon of clarity. That same observation troubled the Third Circuit, which in the American Iron and Steel case dealt with the ambiguities of the Act thusly (slip op. 8-9):

While we admit that Congress did not express its intent on this point with particular clarity, we conclude, after examining the entire statutory scheme and the legislative history, that the Administrator's power to promulgate effluent limitations under section 301 can be inferred. 14a/

14a/ . . . Congress' failure to express more clearly its intent on such a crucial matter is indeed disturbing and we hope that Congress will heed our admonition to draft its legislation with greater clarity. The admitted ambiguities in this Act, however, cannot be an excuse to avoid deciding the case before us, and we are satisfied that our resolution of the Act's ambiguities is the one most consistent with Congress' expressed intent. [Emphasis added.]

Respectfully submitted,

Michael D. Graves

MICHAEL D. GRAVES
Attorney, Department of Justice
Washington, D. C. 20530
(202) 739-4496

ATTACHMENT 3

REPLY BRIEF FOR APPELLANTS

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

No. 75-1404

AMERICAN PETROLEUM INSTITUTE, ET AL.,

Appellants,

v.

RUSSELL E. TRAIN, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Of Counsel:

Stark Ritchie
Lloyd R. Cress
Clyde R. Hampton
Jess W. Van Ert
William E. Schweinle, Jr.
Carl W. Jones
James A. Evans
Frederick H. Hawkins
William J. Webb
Nicholas I. Cantor
Stephen H. Bard
Donald Gearhart

Frank H. Morison
Edwin S. Kahn
Gerald W. Grandey
of
HOLLAND & HART
500 Equitable Building
730 Seventeenth Street
Denver, Colorado 80202

Frederick M. Rowe
Edward W. Warren
Robert F. VanVoorhees
of
KIRKLAND, ELLIS & ROWE
1776 K Street, N.W.
Washington, D. C. 20006

Counsel for Appellants

October 22, 1975

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UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

No. 75-1404

AMERICAN PETROLEUM INSTITUTE, ET AL.,

Appellants,

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RUSSELL E. TRAIN, ET AL.,

Appellees.

REPLY BRIEF FOR APPELLANTS

PRELIMINARY STATEMENT

In their answering brief filed October 1, 1975, Appellees ("EPA") present the Court with an interpretation of EPA's statutory authority and regulatory responsibilities which is directly at odds with Appellants' ("API") construction of the Federal Water Pollution Control Act Amendments of 1972 ("the Act").

For, despite the Eighth Circuit's contrary holding in CPC Int'l, Inc. v. Train, 515 F.2d 1032 (1975), which the Solicitor General decided not to take before the Supreme Court,[1/] EPA still

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1/ The time for filing a petition for certiorari to the U.S. Supreme Court in CPC Int'l expired on October 2, 1975. No petition for certiorari was filed by the Solicitor General.

maintains that it was authorized and "did establish effluent limitations for existing petroleum refineries by regulation." (EPA Br. 7.)[2/] Indeed, coining the counterfeit expression "effluent limitations guidelines" which nowhere appears in the Act, EPA claims that its regulations for existing petroleum refineries are "both Section 301(b) effluent limitations and Section 304(b) effluent guidelines." (Id.)

Having thus rewritten the Act to provide for so-called "effluent limitations guidelines," identical in form and format to new source standards of performance, EPA argues that this Court has jurisdiction because its "regulations in fact constitute Section 301(b) effluent limitations."[3/] (EPA Br. 21.) Despite its contrary stance in CPC Int'l, supra, 515 F.2d at 1037, EPA now suggests for the first time that jurisdiction may exist "even if this Court finds that EPA is not authorized to issue effluent limitations by regulation," since the Court may construe

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2/ All emphasis added unless otherwise indicated.

3/ EPA also posits an "ancillary jurisdiction" basis which has no application to this appeal. Specifically, EPA argues that "this Court should exercise ancillary jurisdiction over the Section 301/304 regulations in connection with its exclusive review of the challenged Section 306 new source performance standards and Section 307 pretreatment standards." (Id.)

But Appellants' complaint in this case, and hence the issue in this appeal, challenges only EPA's existing plant regulations, not EPA's new source or pretreatment standards. Thus, there is no predicate for the application of ancillary jurisdiction here. Compare API et al. v. EPA et al., No. 74-1465 and consolidated cases; API Br. 12, n.5.

the Act as requiring "guidelines" for setting effluent limitations in the permit-issuing process which are reviewable as an "action" of the Administrator in "approving or promulgating" effluent limitations. (EPA Br. 21-25.) 4/

As framed by EPA, therefore, the key issue before the Court is whether EPA was empowered by Congress to promulgate regulations setting national effluent limitations for existing plants, comparable to Section 306 standards of performance for new plants, rather than flexible "guidelines" for setting individual plant effluent limitations in the permit-issuing process.

4/ The question of whether the issuance of valid "guidelines" would be an "action" in "approving or promulgating" effluent limitations requires a comprehensive interpretation of the Act, including the "role played by the section 304(b) guidelines" in setting effluent limitations. Natural Resources Defense Council, Inc. v. Train, 510 F.2d 692, 710 n.101 (D.C. Cir. 1975) (eschewing consideration of the "form, format and content" of guidelines and upholding district court jurisdiction). Compare Natural Resources Defense Council, Inc. v. Train, 519 F.2d 287 (D.C. Cir. 1975) with Natural Resources Defense Council, Inc. v. EPA, 512 F.2d 1351 (D.C. Cir. 1975); cf. Oljato Chapter of the Navajo Tribe v. Train, 515 F.2d 654 (D.C. Cir. 1975); Big Rivers Electric Co. v. EPA, No. 74-2015 (6th Cir. 1975).

This question was never considered by the district court which, in fact, denied Appellants' discovery relevant to the question. Moreover, under no circumstances can jurisdiction be predicated on EPA's issuance of so-called "effluent limitations guidelines" rather than statutory guidelines which provide a range of discharge levels and specify factors to be taken into account in the permit-issuing process.

As we shall show, EPA's claimed authority to issue national existing plant standards is fundamentally at odds with the pragmatic Congressional plan for setting effluent limitations through the permit-issuing process. Thus, the Section 304(b) guidelines themselves, not to mention the States' Section 101 "primary" pollution control responsibilities and EPA's Section 402(d)(2) veto power of individual permits, would be superfluous if EPA were actually authorized to promulgate national existing plant standards.

Indeed, EPA's own original and correct interpretation of the Act's requirements was that effluent limitations must be set on a "plant-by-plant basis" subject to the statutory "guidelines" since "there is no way anyone can sit in Washington and . . . specify the effluent limitations that should be attained at numerous plants across the country." (Quarles Address, p. 18, infra.) Not until "after the FWPCA became law in 1972" did EPA unlawfully decide to rewrite the statutory plan as an expedient for shortcutting its statutory responsibilities under the Act. (EPA Br. 7, n.4.)

I. EPA'S CLAIMED AUTHORITY TO ISSUE "NATIONALLY PROMULGATED STANDARDS FOR EXISTING PLANTS" IS FUNDAMENTALLY AT ODDS WITH CONGRESS' PRAGMATIC "GUIDELINES" FOR SETTING INDIVIDUAL PLANT EFFLUENT LIMITATIONS.

EPA concedes, as it must, that "the Act does not explicitly state that effluent limitations are to be established by regulation." (EPA Br. 11.) Lacking such express authority, EPA looks far and wide for scraps of statutory language to justify issuance of its so-called "effluent limitations guidelines" as hard-and-fast standards for existing plants. (EPA Br. 11-17.)

But EPA's futile search cannot contrive statutory authority where none exists. For, as demonstrated below, EPA's claimed authority to issue national effluent standards for existing plants is fundamentally at odds with the overall statutory plan in the following critical respects:

(1) EPA erases the statutory distinction between standards and limitations, and ignores the express Section 306 authority to promulgate standards for new, but not existing, plants;

(2) EPA writes the Section 304(b) "guidelines for effluent limitations" out of the Act; and

(3) EPA usurps the States' "primary" pollution control responsibilities, and renders meaningless EPA's Section 402(d)(2) veto power over permits "outside the guidelines and requirements of the Act."

A. EPA Erases the Statutory Distinction Between Standards and "Effluent Limitations," and Ignores the Express Section 306 Authority To Promulgate Standards for New, But Not Existing, Plants.

According to EPA, there is "no support whatsoever in the Act or in the legislative history" for distinguishing between "standard" and "limitation," and that Congress considered the two terms "to be equivalent." (EPA Br. 14-15.)

Notwithstanding EPA's hyperbole, the statutory text itself not only distinguishes between standards and limitations, but also consistently uses the term "standards" when Congress intended EPA to promulgate fixed, across-the-board restrictions by regulation, and the term "limitations" when Congress referred to conditions contained in individual discharge permits. As previously detailed, the Act:

(1) Expressly provides that standards, but not limitations, "be published by regulation" within "a fixed period of time." CPC Int'l, supra, 515 F.2d at 1038; API Br. 26;

(2) Uniformly uses the term "standard," not "limitation," whenever across-the-board restrictions were intended. CPC Int'l, supra, 515 F.2d at 1038; API Br. 17;

(3) Makes standards, but not limitations, "enforceable independently of the permit system. See § 306(e); § 307(d)." CPC Int'l, supra, 515 F. 2d at 1038; API Br. 16;

(4) Calls for "effluent limitations," not standards, to be set "in the permit-issuing process." CPC Int'l, supra, 515 F.2d at 1039; API Br. 22; 5/ and

5/ Significantly, EPA concedes that "effluent limitations authorized by other sections may be established in individual permit proceedings," and that "determinations of limitations needed to comply with water quality standards are made on a case-by-case basis." (EPA Br. 11, n.6.)

(5) Defines effluent "limitation," not standard, to include "schedules of compliance" which, by their nature, can be established only in the context of an individual discharge permit. Section 502(11).

This statutory distinction between limitations and standards is dramatically confirmed by comparing Sections 301, 304, and 306, applicable to control of pollution from existing and new sources respectively. Again, as demonstrated in our opening brief:

(1) Congress recognized that "across-the-board requirements" could "be justified" for new but not existing plants in view of the many more pollution control "options" available to new plants, and the highly variable costs of retrofitting existing plants. CPC Int'l, supra, 515 F.2d at 1038, n.13; API Br. 17-19; 6/

(2) In contrast to Section 301, which concedely does not provide for any regulations, Congress explicitly provided in Section 306(b)(1) for "Federal standards of performance for new sources," promulgated by a fixed deadline and made enforceable under Section 306(e) independently of the permit program. CPC Int'l, supra, 515 F.2d at 1038; API Br. 17-19;

(3) To underscore its purpose that only new sources be regulated by national standards, Congress consciously used the word "standard" no less than nineteen times in Section 306, relating to new plants, but never once mentioned "standards" in either Section 301 or 304, applicable to existing plants. API Br. 16.

6/ EPA now admits that "Congress expected a greater range of pollution control options to be available for new sources, and that existing source regulations may therefore be more flexible than those for new sources." (EPA Br. 30.)

EPA does not actually contest, much less refute, this "overwhelming evidence of statutory intent," CPC Int'l, supra, 515 F.2d at 1042. Instead, EPA lamely cites two inapposite, out-of-the-way statutory references which purportedly belie the consistent statutory pattern, and prove the claimed equivalence of "limitation" and "standard" under the Act. (EPA Br. 15.)

Not surprisingly, EPA nowhere explains why Congress supposedly chose to reveal the purported equivalence of standard and limitation only in what could be generously characterized as tangentially related provisions of the Act. Yet, when closely scrutinized, even EPA's limited references are fully consistent with the Congressional demarcation between "standards" and "limitations."

For example, the expression "any standard established pursuant to Section 301" contained in Section 316(b) is easily reconciled by reference to Section 301(b)(1)(A)(ii), which provides for the achievement by 1977 of "applicable pretreatment requirements under Section 307." See also Section 301(b)(2)(A)(ii). Established pursuant to this provision of Section 301, of course, are the pretreatment standards of Section 307(b) & (c), thereby explaining the mention of "standard" in Section 316(b).

The reference to "any effluent limitation or other limitation under Section 301, 302 and 306" in Section 509(b)(1)(E) is likewise explainable. This provision provides jurisdiction to review state permits approved by EPA pursuant to the veto

power of Section 402(d)(2). Since a state is authorized under Section 306(c) to incorporate standards of performance as effluent limitations for individual new source permits, the reference to "limitation under . . . Section 306" was appropriate and necessary.

Actually, Section 509(b)(1) underscores Congress' distinction between "standards" and "limitations." For, apart from Section 509(b)(1)(E) review of state permits, Congress provided separately in Section 509(b)(1)(A) for review of the Administrator's action "in promulgating any standard of performance." If "standard" were "equivalent" to "limitation," this review provision would be redundant in light of Section 509(b)(1)(E).

While EPA's references, if anything, support API's interpretation of the Act, such microscopic examination of isolated, marginally relevant provisions provides, at best, inconclusive evidence of Congress' intent. But when the Act is considered as a coordinated whole, EPA's claimed equivalency between "standards" and "limitations," not to mention its purported authority to issue national "effluent limitations" by regulation, is overwhelmingly refuted.

For above all, EPA has yet to suggest any explanation for why "Congress provided unambiguously for the promulgation of national standards in other sections of the Act," but studiously avoided authorizing the promulgation

of any "standards" for existing sources. CPC Int'l, supra, 515 F.2d at 1038. 7/

B. EPA Writes the Section 304(b) "Guidelines for Effluent Limitations" Out of the Act.

EPA is satisfied with nothing less than a wholesale rewrite of the statutory plan devised by Congress. Thus, just as EPA would inject authority to promulgate existing source standards where none exists, so too would EPA delete the Section 304(b) "guidelines for effluent limitations" from the Act.

Specifically, as detailed in our opening brief, EPA's "guidelines for effluent limitations" were expressly designed by Congress for use in the Section 402 state/federal permit program:

(1) "The permit-issuing authority is to follow the guidelines promulgated under § 304" in setting effluent limitations in individual existing plant permits. CPC Int'l, supra, 515 F.2d at 1038; API Br. 31-37;

(2) These "guidelines for effluent limitations" must "identify" in terms of a "range" the "degree of effluent reduction" attainable through application of the respective 1977 and 1983 technologies. API Br. 33;

(3) The guidelines must also "specify factors" for future use by permit-issuing authorities in setting allowable discharge levels for discrete existing plants within each industrial category. API Br. 35.

7/ Needless to say, EPA cannot bootstrap such authorization by blanket reliance on Section 501(a) which permits only such regulations as "are necessary to carry out [the Administrator's] functions under this Act." (EPA Br. 11.) Neither the Act nor its legislative history makes it the Administrator's function to promulgate nationwide standards for existing sources. Compare Section 301(b) with Section 304(b), Section 306(b)(1)(B), Section 307(a)(2) and Section 307(b)(1), each of which states explicitly what "the Administrator shall" do.

Notwithstanding these specific requirements, EPA dispensed with the statutory "guidelines" by a specious two-step syllogism. Thus, having assumed authority to promulgate national effluent limitations by regulations, EPA concluded that the Section 304(b) "guidelines" were only for EPA's own internal use. And, since the guidelines were only for interim use anyway, EPA saw no reason why guidelines should not be issued simultaneously with, and as part of, EPA's national effluent limitations.

To legitimatize this mismatch of "Section 301(b) effluent limitations and Section 304(b) effluent guidelines," (EPA Br. 7), EPA coined the counterfeit expression "effluent limitations guidelines," which appears nowhere in the Act. The effect of this sleight-of-hand, of course, is to render Section 304(b) guidelines superfluous and redundant.

For example, the statutory requirement that EPA publish guidelines "within one year of enactment" is meaningless if such guidelines simply merge into national effluent limitations issued by EPA subject to no statutory deadline.

What is more, the detailed and specific statutory requirements for guidelines set forth at length in Section 304(b), would make no sense if such guidelines were only for internal administrative guidance to be used exclusively by the very same EPA officials drafting national standards for existing plants.

EPA's only excuse for dispensing with the Section 304(b) guidelines is that any other course would be "impractical." (EPA Br. 32.) For, according to EPA, the statutory guidelines "may only include some unspecified broad range of numerical pollutant discharge levels," and "even these ranges must be reassessed by the permit writer." (Id.)

But there is nothing "impractical" about the statutory guidelines, since, as EPA itself concedes, "effluent limitations authorized by other sections" of the Act are now "established in individual permit proceedings" on "a case-by-case basis." (EPA Br. 11, n.6.)

Moreover, the range of discharge levels required by the guidelines is "unspecified" only because EPA chose not to follow the statute. And, despite EPA's startling lament that it would have to "consider the statutory factors" in preparing such guidelines (EPA Br. 32), the required range of discharge levels need be only so "broad" as to accommodate the range of disparate existing plants for each industry category or subcategory.

Finally, notwithstanding EPA's implication to the contrary, API has never maintained that the range of discharge levels in the statutory guidelines would be subject to reassessment "by the permit writer." On the contrary, the statutory "guidelines" were actually a legislative compromise between de novo development of limitations in permits on the one hand,

and unbendi . national discharge standards on the other, so that the permitting authority, through "the careful exercise of professional judgment," may select individual permit conditions from the "range" in the guidelines "based on the relative importance" of specified industry "factors" without ab initio consideration of each facility. (API Br. 21, 36.)

In short, the detailed and specific requirements of the Section 304(b) guidelines have no function or meaning under EPA's redrafted statutory scheme which substitutes EPA's so-called "effluent limitations guidelines" for the pragmatic "guidelines for effluent limitations" actually mandated by Congress. EPA's spurious contention that the statutory plan is "impractical" cannot nullify Congress' adoption of "guidelines" as a sensible middle ground between: (i) rigid, nationwide standards; and (ii) de novo consideration by the permit-issuing authority of all aspects of each individual plant.

C. EPA Usurps the States' "Primary" Pollution Control Responsibilities, and Renders Meaningless EPA's Statutory Veto Power Over Permits "Outside the Guidelines and Requirements of the Act."

An inevitable consequence of EPA's redraft of the Act is that EPA's so-called "effluent limitations guidelines" become "minimum national standards for industry categories, to be mechanically cranked into individual permits issued by the States or EPA." CPC Int'l, supra, 515 F.2d at 1037.

As previously detailed, this result usurps the States' "primary" pollution control responsibilities guaranteed by Section 101(b) (API Br. 37-39), and renders meaningless EPA's veto power over individual permits codified in Section 402(d)(2) as an alternative to "nationally promulgated effluent standards." CPC Int'l, supra, 515 F.2d at 1040-41; API Br. 48-53. "It is hard to imagine a clearer indication that the permit-issuing authority is to follow the guidelines promulgated under § 304(b), and is not to refer to independent regulations promulgated under § 301." CPC Int'l, supra, 515 F.2d at 1038-1039.

Even EPA tacitly acknowledges that the state permit-issuance authority is left with about as much discretion as a check-out clerk applying a sales tax table to calculate the tax on groceries purchased in the supermarket. Thus, according to EPA, all the state authority need do is "determine the appropriate subcategory for an individual plant [predetermined in EPA's Development Document], decide on the appropriate production figures [which are submitted by the plant] and calculate the limitations to be

included in the permit" from tables set forth in EPA's so-called "effluent limitations guidelines." (EPA Br. 33.)

EPA searches desperately for any way to make EPA's Section 402(d)(2) veto power meaningful under these circumstances.

Thus, EPA argues that the statutory veto power was included simply so that EPA might insure "proper application" of the national standards and prevent the states from issuing "meaningless permits" containing limitations more lenient than the standards. (EPA Br. 16.) But plainly, if, as EPA claims, Section 301 authorized national existing plant standards, then any state permit which sets less stringent conditions would be void on its face, thus making the Section 402(d)(2) veto provision unnecessary.[8/]

Stretching even further, EPA contends that "the veto power also allows scrutiny of state-issued permits for compliance with Section 304(h) guidelines." (EPA Br. 16.) However, Section 402(d)(2) has nothing to do with Section 304(h) guidelines which "concern the necessary elements of a state permit program," not "the conditions which must be written

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8/ EPA makes much of the fact that the statutory veto power theoretically extends "to state-issued permits for new sources." (EPA Br. 16.) But the veto power is actually meaningful only for existing plants, since new source standards of performance, like other standards under the Act, are "enforceable independently of the permit system. See § 306(e); § 307(d)." CPC Int'l, supra, 515 F.2d at 1038.

into a permit." CPC Int'l, supra, 515 F.2d at 1038, n.14.[9] Instead, Congress provided in Section 402(c)(3) for the separate remedy of "EPA withdrawal of approval of the whole state permit program" for "state failure to comply with the § 304(h) guidelines." (Id.)

In sum, even EPA's strained argumentation cannot obscure Congress' real purpose in adopting the Section 402(d)(2) veto power. For in lieu of nationally promulgated existing source standards, an alternative which it deliberately rejected, Congress opted for EPA veto power as the most practical means of guaranteeing uniform and even-handed state application of the flexible Section 304(b) guidelines in individual existing plant permits. CPC Int'l, supra, 515 F.2d at 1041.

9 / EPA mistakenly argues that "the subsection designation for Section 304(h) was inadvertently omitted from the reference to 'guidelines' in Section 402(d)(2). (EPA Br. 16, n.9.) EPA's argument is refuted not only by the consistently explicit reference to Section 304(h)(2) guidelines elsewhere in Section 402, but also by the legislative history which confirms that "the word 'guidelines' in § 402(d)(2) refers to § 304(b)." CPC Int'l, supra, 515 F.2d at 1039, n.14.

II. EPA UNLAWFULLY JETTISONED CONGRESS' PLAN FOR CONTROL OF EXISTING SOURCE POLLUTION BY FLEXIBLE GUIDELINES "AFTER THE FWPCA BECAME LAW IN 1972."

As demonstrated above, EPA's rigid national existing plant standards are diametrically contrary to Congress' plan for control of widely disparate existing plants by Section 304(b) "guidelines" for setting "effluent limitations" in the permit-issuing process.

This EPA interpretation of the Act actually derives not from the statutory language or the legislative history, as EPA claims, but from an expedient EPA decision, made long "after the FWPCA became law in 1972," that promulgation of rigid, national existing plant standards would somehow streamline its job of issuing discharge permits for each individual plant. Thus, as detailed below:

(1) EPA's own original interpretation recognizing Congress' flexible existing plant guidelines was not abandoned until "after the FWPCA became law in 1972";

(2) EPA's belated "variance clause" cannot lawfully substitute for Congress' Section 304(b) guidelines, or simulate flexibility where none exists; and

(3) None of EPA's remaining arguments refute Congress' plan for flexible existing plant guidelines, or make any other provision of the Act redundant.

A. EPA's Own Original Interpretation Recognizing Congress' Flexible Existing Plant Guidelines Was Not Abandoned by EPA Until "After the FWPCA Became Law in 1972."

EPA cannot contest that it originally recognized that "every plant involves individual factors which differentiate it from others," and that under the Act "determinations of best practicable technology must be made individually as to each plant." (API Br. 23, 31.) This EPA interpretation, as well as Congress' rationale for flexible guidelines, was concisely summarized by Assistant Administrator for Enforcement and General Counsel Quarles after passage of the Act by both Houses of Congress:

> "The key to most of the puzzles concerning the policies we will follow in this area is that specific determinations as to application of best practicable control technology currently available can only be made on a plant-by-plant basis. There is no way that anyone can sit in Washington and prepare a document that will specify the effluent limitations that should be attained at numerous plants across the country." 10/

Thereafter, EPA implemented such a flexible approach of "plant-by-plant" determinations for the petroleum refining industry by publication of its "Petroleum Refinery Guidance" document in March 1973. This EPA document specifically acknowledged that circumstances "will vary widely among individual refineries." Accordingly, it specified a host of specific "factors" for the exercise of professional judgment by the permit-issuing

10/ Address of John R. Quarles, Jr., to an EPA-Manufacturing Chemists Association Symposium, September 13, 1972.

authority in setting effluent limitations for individual refineries.

EPA would have the Court forget this prior EPA construction of the Act as "irrelevant" simply because EPA subsequently decided it would be expedient to jettison the statutory guidelines. For even EPA's face-saving explanation concedes that:

> "[C]ompletion of detailed technical studies after the FWPCA became law in 1972 convinced the Agency that, except for unusual circumstances handled by a variance clause, effluent limitations could fairly be established for whole classes and categories of point sources." (EPA Br. 7, n.4.)

But whatever subsequent and unidentified "studies" may have "convinced" EPA, they concededly post-date the Act, have no bearing on Congress' intent at the time of passage, and hence provide no help in construing the Act.

On the contrary, it is EPA's original interpretation accepting Congress' flexible guidelines which is legally significant. Indeed, the Supreme Court has stressed time and again that courts should pay "great deference," not to a subsequent agency rewrite of the statutory requirements, but to a "contemporaneous construction of a statute by the men charged with the responsibility for setting its machinery in motion." Udall v. Tallman, 380 U.S. 1, 16 (1965); Accord, Train v. NRDC, ___ U.S. ___, 95 S.Ct. 1470, 1479-80(1975)(Rejecting EPA's subsequent interpretation permitting only pre-attainment variances in favor of EPA's original interpretation that both

pre- and post-attainment variances are permissible under Section 110 of the Clean Air Act).[11/]

In a last-ditch effort to explain away its original correct interpretation of the Act, EPA argues that, although the guidelines approach was accepted by EPA, "the views of responsible legislators changed on this point" so that "[b]y the time of enactment" it was "abundantly clear" that EPA was "to issue national effluent limitations." (EPA Br. 18.) Besides being contrary to statements of both EPA's Administrator and General Counsel after enactment (API Br. 23-24, 31), this EPA contention is flatly contradicted by the legislative history.

Ignoring the extensive legislative history confirming API's interpretation of the Act, EPA cites only three references, two of which were previously discussed in API's opening brief. (EPA Br. 18-19.) Specifically, EPA places heavy reliance on remarks by Senator Muskie suggesting the need for "nationally uniform effluent limitations." (Id.) But, as previously detailed, Congress actually chose guidelines, not "nationally promulgated effluent standards" as "the means of achieving [the] uniformity" of the effluent limitations referred to by Senator Muskie. CPC Int'l, supra, 515 F.2d at 1042; API Br. 48-53.

11/ See also Maryland v. EPA, 8 ERC 1105, 1114 (4th Cir. 1975) ("[I]f the acts of the administering agency are not in accordance with law, its actions must be set aside").

Similarly, EPA relies heavily on the Conference Report reference indicating that "the economic impact" of EPA's guideline regulations should be considered "on the basis of classes and categories of point sources." (EPA Br. 19.) However, as previously indicated, this reference actually confirms API's interpretation, since it reflects the Conference Committee's change from the House version, which required case-by-case consideration of all factors, to the final version of Section 304(b)(1)(B), which retains plant-by-plant consideration of other factors but mandates an industry-wide appraisal of the "total cost of application of technology in relation to the effluent reduction benefits to be achieved." (API Br. 36, n.25.) Compare Leg. Hist. 34 with Leg. Hist. 970.

EPA's only new reference pertains not to late changes "as the legislation progressed towards enactment," but to an early comment of Senator Bentsen in floor debates on the Senate bill pointing to regulations which "shall issue pursuant to section 301 and section 304." (EPA Br. 19.) Far from supporting EPA's interpretation, Senator Bentsen's comment simply paraphrases Sections 301(b)(1)(A) and 301(b)(2)(A) which call for "guideline" "regulations issued by the Administrator pursuant to Section 304(b)(2) of the Act."

In short, EPA's smokescreen of obscure and inapposite statutory and legislative history references cannot hide that EPA changed its interpretation only "after the FWPCA became law in 1972." (EPA Br. 7, n.4.) Yet it remains as true today as in

1972, that still "[t]here is no way that anyone can sit in Washington and prepare a document that will specify the effluent limitations that should be attained at numerous plants across the country." (Quarles' Address, September 13, 1972, p. 18 supra.)

B. EPA's Belated Standard "Variance Clause" Cannot Lawfully Substitute for Congress' Section 304(b) Guidelines, or Simulate Flexibility Where None Exists.

Failing all else, EPA argues that its rigid petroleum refinery regulations "have the requisite degree of flexibility" since they purportedly include a "wide 'range' of values," and supposedly allow "the permit-issuing official to grant a variance" based on "fundamentally different factors." (EPA Br. 28-30.)

But the simple fact is that EPA's regulations follow precisely the same format for new and existing plants, and amount to nothing more than a set of multiplication tables which "mechanically crank" out a single number discharge level for each plant.

For this reason, ES&WQIAC, the independent scientific and technical committee chartered by Section 515, has consistently characterized EPA's regulations as "arbitrarily established inflexible standards" which give little consideration to "great differences in individual facilities among generic industries with regard to raw waste load, size of plant, and climatic and geographic location factors." (API

Br. 42.)[12/] "Rather than set one number as an effluent limitation to be met by all plants within an industry," ES&WQIAC recommends that "guidelines should establish a range of limits." (Id.)

Yet the state permit-issuing authority now has no discretion to depart from the predetermined discharge level set by EPA in Washington. Even regarding EPA's so-called "variance clause," the state can only recommend that EPA consider modification of its standards.

The variance clause itself has no statutory basis whatsoever, and little, if any, practical utility. To begin with, EPA's clause is identical for all industries, thereby underlining EPA's failure as required by Section 304(b) to "specify factors to be taken into account" within each industrial category for utilization by permit-issuance authorities in setting individual plant effluent limitations.

Moreover, the clause by its own terms applies only in 1977 to "factors . . . fundamentally different from the factors considered in the establishment of the guidelines." 39 Fed. Reg. 16560, 16564. This condition has, in practice, presented an insurmountable hurdle to individual plant con-

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12/ EPA mistakenly argues that ES&WQIAC's comments are "irrelevant." (EPA Br. 20, n.11.) However, Congress assigned ES&WQIAC the statutory responsibility to oversee and criticize development of EPA's regulations. (API Br. 41.) ES&WQIAC's critique demonstrates that EPA's regulations are unscientific, inflexible, and technically unsound, a result plainly never intended by Congress.

sideration of widely varying age, climatic, engineering, and other factors purportedly taken into account by EPA in formulating its so-called "effluent limitations guidelines."

In short, far from providing the flexibility intended by Congress, EPA's variance clause merely simulates flexibility where none exists as a means of shoring up EPA's untenable legal position in this and other pending litigation. But EPA's artificial "variance clause" cannot and must not be allowed to substitute for the realistic relief mandated in the statutory Section 304(b) "guidelines for effluent limitations."

C. None of EPA's Remaining Arguments Refute Congress' Plan for Flexible Existing Plant Guidelines or Make Any Other Provision of the Act Redundant.

Over and above the specific points previously discussed, EPA cites several additional provisions of the Act which it claims support EPA's purported authority to issue nationally promulgated standards for existing plants. Far from supporting EPA's position, most of these provisions demonstrate the fallacy of EPA's reading of the Act.

For example, EPA asserts that API has "utterly failed to suggest any congressional purpose" for Section 301(c), which EPA attributes to Congress' intent that "BAT . . . be set on a national basis," with Section 301(c) included "as a safety valve for particularly hard-hit sources." (EPA Br. 12.) However, the application of Section 301(c) is restricted to

"modifying the requirements" of Section 301(b)(2)(A), which, in turn, does nothing more than require a compliance deadline of July 1, 1983 for effluent limitations set pursuant to the Section 304(b) guidelines.

The sole purpose of Section 301(c), therefore, is to permit EPA to extend the statutory deadline beyond July 1, 1983, subject to a compliance timetable in accordance with Section 301(c)(1) & (2). Nothing in Section 301(c) authorizes EPA to change any effluent limitation which still must be set pursuant to the Section 304(b) guidelines in the permit-issuing process.

Next, EPA argues that "Section 301(b)(2)(A) . . . requires effluent limitations to be established for categories and classes of point sources." (EPA Br. 12.) When compared with the corresponding Section 301(b)(1)(A) reference to "effluent limitations for point sources," however, the Section 301(b)(2)(A) reference merely underscores that EPA may consider a full, industry-wide range of "control measures and practices including treatment techniques, process and procedure innovations," for 1983, rather than simply the end-of-pipe "control technology mandated for 1977." See API Br. 28-30. 13/

13/ Specifically, as the House Report explained:

> "By the term 'control technology' the Committee means the treatment facilities at the end of a manufacturing, agricultural, or other process rather than control technology within the manufacturing process itself."

H.R. Rep. 92-911, 92d Cong., 2d Sess. 101; Leg. Hist. 788.

EPA further argues that, without Section 301 authority to issue existing plant standards, the Section 301(d) requirement that 1983 effluent limitations "be reviewed at least every five years," would be superfluous in light of the Section 402(b)(1)(B) requirement that permits be for "fixed terms not exceeding five years." (EPA Br. 12-13.) But EPA overlooks that the Section 402(b)(1)(B) provision applies principally to the States, not EPA, so that Section 301(d) is necessary to require EPA, as well as the States, to review post-1983 effluent limitations set in the permit-issuing process. See API Br. 31-32, n.23.[14/]

Straining still further, EPA urges that the separate reference to Section 301 as well as to Section 402 permits in Section 505(f) would be unnecessary if all effluent limitations were set in permits. (EPA Br. 14.) However, the "independent reference to § 301 is necessary because § 301(f) bans the discharge of radiological, chemical and biological warfare agents and highlevel radioactive wastes." CPC Int'l, supra, 515 F.2d at 1043.

Finally, EPA argues that "[i]f Congress had intended effluent limitations to be established in the permitting process,"

14/ Similarly, regarding the Section 301(e) reference to "effluent limitations established pursuant to this Section," the most plausible explanation is that "limitations established in permits are 'pursuant to' § 301's command that application of certain technologies be required." CPC Int'l, supra, 515 F.2d at 1042; API Br. 31-32, n.23.

Section 510 would have referred to the Section 304 guidelines. (EPA Br. 17-18.) But EPA misses the entire point of Section 510. For that provision is intended to preserve the right of those states without Section 402(b) approved permit programs to operate their own water pollution control schemes separate from the State/Federal permit program of Section 402, thereby making any reference to Section 304 guidelines unnecessary.

CONCLUSION

For the reasons set forth in API's Opening Brief, as amplified in this Reply Brief, the Court should grant the relief requested at the conclusion of API's Opening Brief, filed June 12, 1975.

Respectfully submitted,

HOLLAND & HART

By Frank H. Morison
Frank H. Morison
500 Equitable Building
730 Seventeenth Street
Denver, Colorado 80202

Frederick M. Rowe
Edward W. Warren
Robert F. VanVoorhees
of
KIRKLAND, ELLIS & ROWE
1776 K Street, N.W.
Washington, D. C. 20006

Counsel for Appellants

Of Counsel:

Stark Ritchie
Lloyd R. Cress
Clyde R. Hampton
Jess W. Van Ert
William E. Schweinle, Jr.
Carl W. Jones
James A. Evans
Frederick H. Hawkins
William J. Webb
Nicholas I. Cantor
Stephen H. Bard
Donald Gearhart

October 22, 1975

Suggestion for Clarification

74-1687

SUGGESTION OF THE AMERICAN PETROLEUM INSTITUTE AND ELEVEN MEMBER COMPANIES FOR CLARIFICATION OR MODIFICATION OF THE COURT'S DECEMBER 5, 1974 OPINION

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-1433

NATURAL RESOURCES DEFENSE COUNCIL, INC.,

Appellee

v.

RUSSELL E. TRAIN, ET AL.,

Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Frederick M. Rowe
Edward W. Warren
of
KIRKLAND, ELLIS & ROWE
1776 K Street, N.W.
Washington, D. C. 20006

Attorneys for the
American Petroleum Institute
and Eleven Member Companies

Of Counsel:

Stark Ritchie
Lloyd R. Cress
Clyde R. Hampton
Jess W. Van Ert
William E. Schweinle, Jr.
Carl W. Jones
James A. Evans
Frederick H. Hawkins
Robert A. Meyer
Nicholas I. Cantor
Stephen H. Bard
Donald Gearhart

December 20, 1974

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SUGGESTION OF THE AMERICAN PETROLEUM INSTITUTE AND ELEVEN MEMBER COMPANIES FOR CLARIFICATION OR MODIFICATION OF THE COURT'S DECEMBER 5, 1974 OPINION

PRELIMINARY STATEMENT

In accordance with the Court's December 10, 1974 Order, the American Petroleum Institute and eleven member companies (hereinafter collectively "API") respectfully submit this Suggestion for Clarification or Modification of the Court's December 5, 1974 Opinion.[1/]

1/ With the concurrence of NRDC, EPA moved on December 13, 1974, for a thirty-day extension of time within which to file a petition for rehearing.

In view of approaching statutory deadlines, and in light of the critical significance of this case for prompt implementation of the Nation's new water pollution control program, API deems it inappropriate to delay this Suggestion for Clarification or Modification until expiration of EPA's requested thirty-day extension.

At the outset, API accepts the Court's resolution of the "primary question in this case," namely "interpretation of the time limit imposed for publication of regulations" providing "guidelines for effluent limitations" under Section 304(b) of the Act. (Slip Opin. 5)(emphasis added).

Specifically, the Opinion perceives that Section 304(b) calls for "information . . . to be applied in setting effluent limitations," and that the Act "relies primarily on a permit program for the achievement" of such limitations. (Slip Opin. 2-3, 31)(emphasis added).

Moreover, since the States and EPA Regional Administrators must "apply these guidelines to all point sources through the permits," the timely EPA issuance of guidelines, especially for the major industries listed in Section 306, is imperative particularly in view of the relatively short "30 months lead time" provided by the Act for compliance with effluent limitations in permits. (Id. 6, 30).

At the same time, the Opinion acknowledges "leeway for modification of the December 31, 1974 deadline when circumstances preclude formulation of adequate guidelines," and also that "[t]here may be a number of marginal classes of point sources . . . for which class guidelines would serve little or no purpose" (Id. 35, 38). See API Br. 44-46.

But while the Court initially wrote that guidelines are "to serve as a basis for achieving uniform treatment in the issuance of permits under section 402 . . ." (October 3, 1974 Mem. Opin. 4)(emphasis added), references in the Court's most recent December 5, 1974 Opinion seem in places to equate "uniform treatment" for widely varying existing sources with across-the-board discharge numbers, predetermined by EPA and routinely incorporated by the States and EPA Regional Offices in discharge permits.[2/]

Such references to "specified, uniform effluent limitations," comparable to uniform new source standards under Section 306, are understandable in view of the one-sided EPA/NRDC presentation then before the Court.

Nonetheless, such dicta could prejudice appeals by API and others directly involving the intended nature and content of statutory "guidelines for effluent limitations" under Section 304(b) of the Act.

Accordingly, over and above the presentation contained in API's Amicus Curiae Brief, this Suggestion for Clarification or Modification will show that the Court's December 5, 1974 Opinion should either be modified to recognize the

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2/ Thus, the Opinion mentions effluent limitations "promulgated" by EPA and states that:

> "Once an effluent limitation is established, however, the state director and regional EPA administrator are required to apply the specified, uniform effluent limitations, modified only as necessary to take account of fundamentally different factors pertaining to particular point sources within a given class or category" (Slip Opin. 34)(emphasis added).

pragmatic Congressional plan of flexible guidelines for existing sources or, at a minimum, clarified to delete all references to EPA promulgation of "specified, uniform effluent limitations" as distinguished from individual plant effluent limitations set under the Section 402 State/Federal permit program.

For, as we shall demonstrate:

(1) Congress provided for "uniform treatment" as well as optimal pollution progress for existing sources by phasing in new technology under flexible guidelines for setting individual effluent limitations in separate plant discharge permits.

(2) Congress sought to assure this "uniformity" for widely varying existing sources, not by rigid nationwide EPA standards, but by according EPA "veto power" over effluent limitations established by State permit authorities through the application of careful professional judgment in individual discharge permits.

(3) Despite the overriding importance of such questions for prompt and effective implementation of the Congressional water pollution control plan, EPA has never explained why EPA abandoned its own prior administrative interpretations of flexible "guidelines" for existing sources, or why EPA has disregarded warnings by the statutory scientific watchdog committee (ES&WQIAC) that "inflexible standards" issued by EPA are "unscientific" and contrary to the Act.

A. BY PHASING IN NEW TECHNOLOGY THROUGH FLEXIBLE GUIDELINES, THE CONGRESSIONAL EXISTING SOURCE CONTROL PLAN OPTIMIZES POLLUTION CONTROL PROGRESS AND ACHIEVES "UNIFORM TREATMENT" FOR WIDELY VARYING PLANTS IN EACH INDUSTRY.

As detailed in API's Amicus Curiae Brief, Congress distinguished between new and existing sources by fashioning separate, complementary regulatory schemes consisting of nationwide, across-the-board standards for plants to be constructed in the future, and flexible "guidelines" to be utilized by permit issuance authorities in setting individual effluent limitations for each plant already in operation. (API Br. 11-20).

Without once hinting at even the possibility of a different construction, or offering any explanation for the separate regulatory systems established by Congress for new and for existing sources, both EPA and NRDC proclaim a common false gospel that "guidelines" are "standards" in apparent hopes that this Court would adopt their interpretation.

Far from representing the intent of Congress, however, this dogmatic, one-sided EPA/NRDC construction of the Act would in the long run neither optimize pollution control progress nor promote "uniform treatment" of existing sources -- a goal originally accepted by the Court and plainly essential if adverse economic and social repercussions are to be avoided.

To begin with, rigid national standards for existing sources would inevitably tend to curtail overall pollution control progress, regardless of rosy, short-term EPA predictions. For to avoid severe economic dislocations, across-the-board standards, in contrast to flexible guidelines, must eventually be geared down to the pollution control capabilities of what the Court in the September 24, 1974 oral argument called the "lowest common denominator" in the industry.[3/]

Paradoxically, the public would then lose pollution control benefits which might have been achieved if existing sources were, as Congress intended, controlled by flexible "guidelines for effluent limitations" rather than procrustean national discharge "standards."[4/]

In short, it was to prevent just such arbitrary treatment and suboptimal pollution control progress that Congress provided flexible existing source guidelines for setting individual plant effluent limitations under the State/Federal permit program.

3/ Cf. International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 638, 641 (D.C. Cir. 1972)("Eleventh hour grant of suspension" would likely result in "standards . . . set to permit the higher level of emission control achievable by the laggard" with concomitant "grave maladjustments for the technological leader")(emphasis added).

EPA would paper over this dilemma for the petroleum refining industry by biased existing source standards based on the capabilities of twelve "exemplary" plants out of a universe of over 250 refineries. Even then, the discharge numbers prescribed by EPA are so stringent that only one of the twelve carefully selected "exemplary" refineries actually complies with the 1977 discharge numbers for every pollutant parameter. See Appendix, API Amicus Curiae Brief, pp. 6-8.

4/ See API Br. 14-17, 26-30 (discussing this point in greater detail.

B. CONGRESS CONFIRMED ITS GUARANTEE OF "UNIFORMITY" FOR EXISTING SOURCES, NOT BY AUTHORIZING "SPECIFIED, UNIFORM EFFLUENT LIMITATIONS," BUT BY ACCORDING "EPA VETO POWER" OVER EFFLUENT LIMITATIONS SET IN INDIVIDUAL PLANT DISCHARGE PERMITS.

Perceiving that new source standards under Section 306 govern a firm's propensity to relocate, the Court's December 5, 1974 Opinion eschews NRDC's argument "that effluent limitations must be uniform across the nation to prevent industries from 'forum shopping' among the States" (See API Br. 17-19).

Instead, the Opinion suggests that, as to "specified, uniform effluent limitations":

> "The decentralization of permit issuing authority envisioned by section 402 prompted concerns that individual threats to relocate in areas where pollution controls were less restrictive would coerce states into adopting lax permit requirements" (Slip Opin. 33).

But the Opinion's legislative history references do not authorize or support EPA issuance of "specified, uniform effluent limitations."

Rather, the statutory text, the legislative history, and underlying policy all manifest Congress' purpose that "uniformity" among existing sources be guaranteed by according EPA "veto power" over effluent limitations established by the States and EPA Regional Administrators based on "careful exercise of professional judgment" in individual plant discharge permits. (API Br. 34.)

The original Senate bill spelled out EPA's authority over the permit program by Section 402(d)(2) which provided that "[n]o permit shall issue until the Administrator is satisfied that the conditions to be imposed by the State meet the requirements of this Act."[5/]

The Administration vigorously opposed this provision as inconsistent with "a meaningful delegation of authority and responsibility to the States," and recommended that legislative action empowering EPA to withdraw State "permit issuing authority in whole or in part" would be "preferable to the permit by permit review" provided in the Senate bill. Leg. Hist. 854-855, 1189-1190, 1205.

Accordingly, the House Public Works Committee bill deleted EPA's veto power over individual permits and confirmed EPA's authority to withdraw permit issuance authority if "a State fails to carry out its obligations and misuses the permit program." H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 127 (1972), Leg. Hist. 814.

5/ Although this provision authorized EPA "to review any permit before it is issued by a State," the Senate Committee envisioned that EPA would "withhold [its] review of proposed permits which are not of major significance" S. Rep. No. 92-414, 92d Cong., 1st Sess. 71 (1971), Leg. Hist. 1489.

This House action was sharply criticized by many persons who believed that "uniformity" among existing plants could be achieved only by "Federal review of permit applications." Leg. Hist. 472-476, 707. As Governor Anderson of Minnesota put it:

> "EPA's veto power should further apply to overcome political and other pressures sometimes exerted by local industry on State agencies."
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> * * *
>
> "The uniformity which I cited at the outset of these remarks as the major necessity for an effective pollution control program cannot, therefore, be achieved without permitting this type of Federal check on permits which simply do not accomplish the job of pollution control" Leg. Hist. 452-53 (emphasis added).

Nevertheless, even though under the House bill EPA would "lose all voice over permits unless it chose to cancel the whole State program," the House voted down a floor amendment sponsored by Congressman Reuss designed to "give the Administrator permit-by-permit review and veto authority over all permits . . ." Leg. Hist. 577, 580, 582.[6/]

Only in the Senate-House Conference Committee did Congress finally amend Section 402(d) to provide the "EPA veto power" deemed essential by Governor Anderson,

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6/ Opponents of the Reuss amendment maintained that Federal review of individual permits was unnecessary because, in view of the Section 306 new source standards, "if an industry threatens to leave an area because of its stringent requirements, it would be confronted with the requirement of meeting the 1981 goal immediately" Leg. Hist. 579-80 (emphasis added). See API Br. 17-19.

Congressman Reuss and others to discourage industry "pressures" on State permit issuance authorities and to safeguard "uniformity" of treatment for widely varying existing discharge sources. Cong. Rep. No. 92-1236, 92d Cong., 2d Sess. 40 (1970), Leg. Hist. 323; Leg. Hist. 362.[7/]

The purpose of this grant of EPA review and veto power over individual permits directly contradicts any notion of nationwide existing source standards, and reaffirms the absence of EPA authority to issue "specified, uniform effluent limitations." For if EPA were actually empowered to issue such across-the-board discharge numbers, neither the State/Federal permit program, nor the much-debated EPA "veto power" under Section 402(d)(2) would be viable or meaningful as a practical matter. (API Br. 30-32).

Moreover, this conclusion is confirmed by the Court's own interpretation of Section 304(b) which itself is inherently and fundamentally at odds with promulgation of uniform, nationwide effluent limitations for existing plants.

7/ Senator Muskie explained the operation of this provision as follows:

> "Should the Administrator find that a permit is proposed which does not conform to the guidelines issued under Section 304 and other requirements of the Act, he shall notify the State of his determination, and the permit cannot issue until the Administrator determines that the necessary changes have been made to assure compliance with such guidelines and requirements" Leg. Hist. 176 (emphasis added).

EPA has implemented its Section 402(d)(2) permit review authority by elaborate procedural regulations providing for "public hearings," "adjudicative hearings" and appeals to the Administrator as a precondition to judicial review under Section 509(b)(1)(F). See API Br. 32, fn. 23.

Thus, the Court's December 5, 1974 Opinion acknowledges that Section 304(b) guidelines are "for the purpose of adopting or revising effluent limitations" (Slip Opin. 31). But this informational purpose fails if guidelines are published simultaneously as binding, uniform nationwide effluent limitations.[8/]

What is more, besides adding yet another layer of EPA regulations to be issued by the end of 1974, any construction of Section 301 calling for "specified, uniform effluent limitations" would defeat and render redundant both the Section 304(b)(1)(A) requirement that EPA "identify" the "degree of effluent reduction attainable," and the Section 304(b)(1)(B) requirement that EPA "specify factors to be taken into account" in determining applicable technology and control measures.

For those provisions would impose useless and meaningless obligations if EPA is itself authorized to promulgate all effluent limitations as single numbers without consideration of the circumstances of individual discharge sources.[9/]

In short, Congress plainly contemplated a comprehensive State/Federal pollution control plan for both new and existing sources, coordinated along the lines set forth in API's Amicus Curiae Brief. (API Br. 21-30).

8/ Congress highlighted its intent that effluent limitations be set in permits by defining "effluent limitations" under Section 502(11) to include "schedules of compliance" which, by their nature, are meaningful only in the context of specific plants.

9/ The Court's December 5, 1974 Opinion underscores this redundancy by mentioning Section 304(b)(1)(B) as a "companion provision" without assigning any significance to its requirements. (Slip Opin. 5).

As part of this pragmatic interrelated plan, Congress chose "guidelines for effluent limitations" to promote "uniform treatment" and to avoid procrustean results for widely varying existing plants. To safeguard this "uniformity" of existing source treatment, Congress opted for Federal review of permits under Section 402(d)(2) subject to eventual judicial review under Section 509(b)(1)(F).

C. EPA HAS NEVER EXPLAINED WHY IT ABANDONED ITS OWN PRIOR ADMINISTRATIVE INTERPRETATION OF FLEXIBLE GUIDELINES, OR WHY EPA IGNORED THE IMPARTIAL RECOMMENDATIONS OF THE STATUTORY SCIENTIFIC WATCHDOG COMMITTEE (ES&WQIAC).

This Court's December 5, 1974 Opinion explicitly accords "great deference to the interpretation given to the statute by the officers or agency charged with its administration," especially when, as here, "the case involves the construction of a new statute by its implementing agency" (Slip Opin. 26).

But EPA's own prior administrative acceptance of flexible existing source guidelines should conclusively refute any subsequently claimed EPA authority to promulgate nationwide existing source standards or "specified, uniform effluent limitations" (API Br. 33-40).

If there were any remaining doubt on this point, the Court should, at a minimum, refrain from rendering a far-reaching interpretation of Section 304(b) without a full explanation

by EPA, detailing why these early, authoritative EPA interpretations were jettisoned by EPA in favor of expedient promulgation of rigid, existing source standards.

This vital need for complete EPA disclosure and candid explication of its position is even more apparent in view of EPA's disregard of the scientific and technical recommendations of the Effluent Standards & Water Quality Information Advisory Committee ("ES&WQIAC") established under Section 515 of the Act. 10/

The House Public Works Committee described the purpose and function of ES&WQIAC, and its intended role in "regulatory decisions," as follows:

> "In order to ensure that effluent limitations and standards criteria issued under this bill are based on the maximum amount of scientific and technical information, Section 515 establishes an Advisory Committee of competent and scientifically qualified independent individuals to participate in the development of information based on which the Administrator would make regulatory decisions" H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 139-40 (1972), Leg. Hist. 826-27 (emphasis added). 11/

In fulfilling its role of providing the "maximum amount of scientific and technical information" for EPA "regulatory

10/ Cf. International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 627-28 (D.C. Cir. 1972)(remand to set forth EPA "consideration" and "basis for disagreement with" conclusions of the 1972 National Academy of Sciences Report, regarding technical infeasibility of compliance with 1975 automobile emission standards).

11/ During consideration of the Act, EPA opposed the formation of ES&WQIAC as an independent watchdog scientific committee. See Leg. Hist. 857, 1207.

decisions," ES&WQIAC has not only criticized EPA's "effluent limitations guidelines" as "unscientific," but has also proposed an alternative technical methodology "for adequately considering the factors required by Section 304(b)(1)(B) of the Act."[12/]

Based on this alternative methodological approach, ES&WQIAC warned EPA on February 28, 1974 that "[m]ost effluent limitations guidelines . . . can be met only under certain controlled, perfect conditions . . . ."[13/]

Most recently, the Chairman of ES&WQIAC publicly voiced concern regarding EPA's interpretation of the terms "exemplary plants," "national standards," "guidelines," "effluent limitations," and "best practicable technology."[14/]

In sum, this history of EPA's disregard of ES&WQIAC's scientific and technical recommendations again highlights EPA's expedient abandonment of its own prior administrative recognition of the need for flexible "guidelines for effluent limitations" as contemplated by Congress in Section 304(b) of the Act.

It also dramatizes that EPA, by issuing rigid existing source standards, has embarked upon a regulatory course which is legally unauthorized, scientifically invalid, and technically illusory.

12/ BNA Environmental Reporter, Current Developments 855 (September 28, 1973).

13/ Id. 1841 (March 8, 1974)(emphasis added).

14/ Id. 1005 (October 25, 1974).

CONCLUSION

For the foregoing reasons, the Court should modify its December 5, 1974 Opinion to recognize the pragmatic Congressional plan for control of existing source pollution through flexible guidelines for setting individual effluent limitations in separate plant discharge permits. (API Br. 44-46).

At a minimum, and especially in absence of a full explanation for EPA's turnaround in its own interpretation of the Act and EPA's disregard of ES&WQIAC's scientific and methodological recommendations, the Court should modify its December 5, 1974 Opinion so as to delete all references to EPA promulgation of "specified, uniform effluent limitations" as distinguished from individual plant effluent limitations set in Section 402 permits.

Respectfully submitted,

Frederick M. Rowe

Edward W. Warren

Edward W. Warren
of
KIRKLAND, ELLIS & ROWE
1776 K Street, N.W.
Washington, D. C. 20006

Attorneys for the
American Petroleum Institute
and Eleven Member Companies

Of Counsel:

Stark Ritchie
American Petroleum Institute

Lloyd R. Cress
Ashland Oil, Inc.

Clyde R. Hampton
Continental Oil Company

Jess Van Ert
Exxon Corporation

William E. Schweinle, Jr.
Gulf Oil Corporation

Carl W. Jones
Phillips Petroleum Company

James A. Evans
Shell Oil Company

Frederick H. Hawkins
Standard Oil Company of California

Robert A. Meyer
Standard Oil Company (Ohio)

Nicholas I. Cantor
Sun Oil Company of Pennsylvania

Stephen H. Bard
Texaco Inc.

Donald Gearhart
Union Oil Company of California

December 20, 1974

CERTIFICATE OF SERVICE

I hereby certify that I have on this 20th day of December, 1974, caused service to be made of the Suggestion of the American Petroleum Institute and Eleven Member Companies for Clarification or Modification of the Court's December 5, 1974 Opinion, dated December 20, 1974, in NRDC v. Train, No. 74-1433, by having a copy placed in the United States mail, postage prepaid and properly addressed, to Lawrence F. Shearer, Esq., Department of Justice, Room 2338, 10th and Pennsylvania Avenue, N.W., Washington, D. C. 20530, and to Edward L. Strohbehn, Esq., Natural Resources Defense Council, Inc., 1710 N Street, N.W., Washington, D. C. 20036.

Edward W. Warren

Edward W. Warren